LIBRARY
SUPREME COURT, U. S.

FILED
JAN 13 1969
JOHN F. DAVIS, CLERK

No. 31, Original

IN THE

Supreme Court of the United States

October Term, 1967

STATE OF UTAH,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

BRIEF OF THE STATE OF UTAH IN SUPPORT OF THE SPECIAL MASTER'S REPORT

VERNON B. ROMNEY
Utah Attorney General
ROBERT B. HANSEN
Deputy Utah Attorney General
DALLIN W JENSEN
Assistant Utah Attorney General
RICHARD L. DEWSNUP
Special Counsel for Utah
Counsel for Plaintiff
236 State Capitol Building
Salt Lake City, Utah 84114

January 10, 1969

CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

POINT I. INTERVENTION BY EITHER MORTON OR M & C CORPORATION WOULD DESTROY THE JURISDICTION OF THE COURT, BECAUSE:

A. TO THE EXTENT THAT PRIVATE CLAIMANTS SEEK TO CLAIM AGAINST THE STATE OF UTAH:

1. UTAH HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY. 8

2. MORTON AND M & C CORPORATION ARE CITIZENS OF STATES OTHER THAN UTAH, AND CONGRESS HAS NOT IMPLEMENTED CONSTITUTIONAL JURISDICTION FOR SUCH CLAIMS IN AN ORIGINAL ACTION.. 10

3. PRIVATE CLAIMANTS OCCUPYING THE SAME LEGAL POSITION AS MORTON AND M & C CORPORATION AND WHO ARE CITIZENS OF UTAH CANNOT INTERVENE, BECAUSE THERE IS NO JURISDIC-

Page

TION FOR SUCH CLAIMS IN AN ORIGINAL ACTION. 11

B. TO THE EXTENT THAT MORTON AND M & C CORPORATION SEEK TO CLAIM AGAINST THE UNITED STATES:

1. THE UNITED STATES HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY..... 13

2. THERE IS NO JURISDICTION IN AN ORIGINAL ACTION FOR CONTROVERSIES BETWEEN THE UNITED STATES AND A CITIZEN OF A STATE. 15

POINT II. NEITHER MORTON NOR M & C CORPORATION IS AN INDISPENSABLE PARTY TO THIS LITIGATION, BECAUSE:

A. THERE WILL BE NO ADJUDICATION OF TITLE AS TO ANY LANDS IN WHICH EITHER MORTON OR M & C CORPORATION CLAIMS AN INTEREST. 16

B. THE PRAGMATIC TEST OF INDISPENSABILITY DICTATES THAT THE COURT SHOULD PROCEED IN THE ABSENCE OF MORTON AND M & C CORPORATION. 18

1. THE NATURE OF THE CONTROVERSY IS HIGHLY UNUSUAL. 20

2. THERE IS NO OTHER FORUM AVAILABLE TO DETERMINE THE PRESENT CONTROVERSY BETWEEN UTAH AND THE UNITED STATES. 21

Page

3. THE NEED TO SETTLE THE PRESENT CONTROVERSY BETWEEN UTAH AND THE UNITED STATES HAS BEEN DEMONSTRATED BY THE LEGISLATIVE AND EXECUTIVE BRANCHES OF BOTH GOVERNMENTS. 22

4. INCLUSION OF MORTON AND THE OTHER PRIVATE PERSONS WOULD CREATE A COMPLEXITY INCAPABLE OF ADJUDICATION. 24

5. ANY RIGHTS OR INTERESTS OF MORTON, M & C CORPORATION, AND OTHER PRIVATE CLAIMANTS, CAN BE PROTECTED IN THEIR ABSENCE. 27

CONCLUSION 28

AUTHORITIES CITED

This brief incorporates by specific reference the arguments, research, and citations of authority contained in Utah's earlier briefs on file with the Court. Since no new issues have been raised, no additional authorities are cited in this brief.

No. 31, Original

IN THE

Supreme Court of the United States

October Term, 1967

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

BRIEF OF THE STATE OF UTAH IN SUPPORT OF THE SPECIAL MASTER'S REPORT

STATEMENT OF THE CASE

Eighteen printed documents have thus far been filed with the Court. It might be somewhat confusing and burdensome for the Court to refer to these documents on file for supplementary citations of authority to sustain the arguments contained in this brief. But

Utah believes that it is preferable simply to summarize in this brief the arguments heretofore made and briefed, and to include references to the earlier briefs on file to sustain such arguments. Otherwise, it would be necessary to re-print substantial extracts from the earlier briefs on file. To aid the Court in referring to and identifying the earlier briefs, it might be mentioned that the parties have consistently followed the same color pattern for the covers of the documents filed. The documents filed by Utah have white covers, the documents filed by the United States have gray covers, the documents filed by Morton International, Inc. have light blue covers, and the documents filed by Great Salt Lake Minerals and Chemicals Corporation have medium blue covers. The report of the Special Master, of course, has a bright yellow cover.

A detailed and documented account of all prior proceedings in this case is included in the report of the Special Master. The memorandum in lieu of exceptions as filed by Great Salt Lake Minerals & Chemicals Corporation contains an excellent summary of the case. Morton International, Inc., has also stated the history of the case to the present time, although somewhat argumentatively, in its exceptions to the report of the Special Master. No useful purpose would be served by any further duplicity in detailing dates and denominations of pleadings filed and proceedings had, and Utah elects simply to state a brief summary of the background, progress and status of the instant litigation.

Since Utah obtained statehood (January 4, 1896), the water level of the Great Salt Lake has fluctuated

erratically and substantially, but has generally lowered, exposing land that earlier constituted a part of the water covered bed of the lake. In recent years, the land thus exposed has been the subject of many conflicting claims of ownership. The claimants have included the State of Utah, the United States, and private persons.

Many attempts have been made to adjudicate title, but no judicial forum could be found that had the necessary judicial power. The lack of a judicial forum was particularly frustrating to the State of Utah, because it felt a compelling economic need to develop the vast mineral potential of the brines of the lake. Since the belt of exposed land surrounding the lake necessarily had to be used to create evaporation ponds to impound brines and precipitate minerals therefrom, no development could proceed until the title uncertainty to the exposed lands was resolved.

Finally, in 1966 Congress enacted Public Law 89-441, 80 STAT. 192, directing the Secretary of Interior to convey the entire federal interest in such lands to the State of Utah, providing for certain reservations, and further providing that claims of private parties would not be affected. This conveyance was intended to be an important initial step in resolving title by removing the United States from the picture. Congress made it clear that any remaining disputes between the State of Utah and private persons as to such lands could then be negotiated or litigated subsequently, and the United States would not be involved.

As consideration for the quitclaim conveyance from the United States to Utah, Utah was required to exe-

cute in favor of the United States a quitclaim deed to all lands around the Great Salt Lake which were situated above and adjacent to the official surveyed meander line. These deeds have been exchanged. Further, Utah was required to elect either to pay the United States for all lands claimed by the United States and purportedly conveyed by its deed to Utah, or to file an original action in this Court to determine what interest the United States had in fact owned and conveyed, and thereafter to pay to the United States the appraised fair market value of any such adjudicated ownership.

Utah elected the latter option, and initated the instant litigation. Thereafter, Morton International, Inc. (herein referred to as Morton) and Great Salt Lake Minerals & Chemicals Corporation (herein referred to as M & C Corporation) sought to intervene, claiming essentially that they claimed rights and interests in the subject lands which would be prejudiced if the litigation proceeded in their absence.

Utah thought that it was clear from the complaint filed by Utah and the answer filed by the United States, that the only purpose of the present litigation was to determine the lands owned and conveyed by the United States so that Utah would know exactly what it had to pay for; and there would be no impact on, or diminution of, any private rights.

In order to make this intended result doubly clear, the parties on May 17, 1968, filed a joint motion for leave to file a stipulation which set forth the fact that neither party sought any adjudication with respect to any lands claimed by any private person. The essence

of the stipulation was simply that there would never be a point in the present litigation where there would be a need to adjudicate title to lands in which private persons claimed ownership interests.

Utah's claim is that it received title to the bed of the Great Salt Lake on January 4, 1896, when it obtained statehood. The claim of the United States is that, even admitting such initial ownership in Utah, the lake has since lowered, exposing lands that once were part of the bed of the lake but are now owned by the riparian upland owner under the common law doctrine of reliction. Utah, in response, denies that the doctrine of reliction is applicable to the Great Salt Lake. This dispute will be fully resolved in adjudicating the ownership of the United States (prior to its conveyance to Utah) of those exposed lands situated between federal public domain lands adjacent to the surveyed meander and the present water level of the lake. If the doctrine of reliction applies, then the United States has prevailed; if the doctrine of reliction does not apply, then Utah has prevailed. Any payment by Utah to the United States will depend on that determination, and that determination only.

Morton opposed the filing of the stipulation; the M & C Corporation did not. The Special Master reported that the stipulation should be amended to place in issue ownership of brines. If so amended and filed, the Special Master recommended that the motions to intervene of Morton and M & C Corporation be denied, and the litigation proceed with only Utah and the United States as parties.

Morton has filed exceptions to the Report of the Special Master, but M & C Corporation has endorsed that Report. Utah likewise endorses the Report, and by this brief respectfully urges the Court to accept, approve and adopt the Report of the Special Master as filed.

SUMMARY OF ARGUMENT

Utah opposes intervention by Morton and M & C Corporation because such intervention (1) is not required because their rights would not be affected, (2) would complicate the litigation to the point that any meaningful adjudication would be impossible, and (3) would destroy the jurisdiction of the Court.

There are five separate questions with respect to jurisdiction, all included within Point I of this brief. Two questions relate to sovereign immunity; namely, neither (1) Utah nor (2) the United States has consented to suit by the applicants for intervention. Two questions relate to the judicial power of this Court; namely, (1) there is no constitutional judicial power in original actions for suits between a state and citizens of the same state, and (2) there is no constitutional judicial power in original actions for suits between the United States and a citizen of a state. The fifth question with respect to jurisdiction is that while there is constitutional judicial power for citizens of one state to sue another state, Congress has not by statute implemented such power and the constitutional grant is not self-executing.

Of the five jurisdictional questions set forth above, the Special Master specifically concluded that three presented insurmountable obstacles which prevented intervention. He found it unnecessary to make any determination or recommendation with respect to the other two. Of the three jurisdictional obstacles so specified by the Special Master, Morton has excepted only to one, *i.e.*, that the State of Utah has not waived its sovereign immunity and has not consented to the intervention. The other two jurisdictional obstacles identified by the Special Master (and which were not excepted to by Morton) are (1) that there is no constitutional authority for private citizens to claim against the United States in original actions, and (2) that there is no constitutional authority in original actions for suits between a state and citizens of the same state.

Point II of this brief shows that no ownership interest of the applicants for intervention will be affected by this proceeding; that said applicants have no right of intervention; and that in equity and good conscience the litigation should proceed in their absence.

ARGUMENT

POINT I

INTERVENTION BY EITHER MORTON OR M & C CORPORATION WOULD DESTROY THE JURISDICTION OF THE COURT, BECAUSE:

A. TO THE EXTENT THAT PRIVATE

CLAIMANTS SEEK TO CLAIM AGAINST THE STATE OF UTAH:

1. UTAH HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY:

a. *SPECIAL MASTER'S RECOMMENDATION*: The motions to intervene should be denied because the State of Utah has not consented to intervention.

b. *UTAH'S POSITION*: Utah concurs in the recommendation of the Special Master.

c. *MORTON'S POSITION*: Morton excepts to the recommendation of the Special Master.

d. *SUMMARY*:

The Special Master has recommended at page 37 of his Report that "Morton's motion should be denied on the ground that the State of Utah has not consented to sue that corporation in this action." The same conclusion is recommended with respect to the M & C Corporation at page 38 of the Report.

Utah concurs in this recommendation of the Special Master. On Pages 35 through 37 of the Report, the Special Master discusses whether Section 78-11-9 of the Utah Judicial Code, 9 Utah Code Anno. (1953), has been repealed by implication by virtue of the subsequent enactment effective July 1, 1966, of the Utah Governmental Immunity Act, 7 Utah Code Anno. (1953), Section 63-30-1 *et seq*. The Report summarizes

the argument of Morton that the earlier consent statute has not been repealed and the argument of Utah that it has been repealed. The Special Master does not find it necessary to decide that question, because, assuming *arguendo*, that the earlier statute has not been repealed, it still is not broad enough to permit the intervention of a party defendant in a suit brought by the State of Utah. Thus, at page 37 of the Report the Special Master concludes:

> Giving the would-be intervenors the benefit of any doubt, and assuming that §78-11-9 has not been repealed, I fail to see how that section aids them here. In my opinion the consent to be sued granted by the Utah Legislature in that section does not encompass the consent to the intervention of anyone as a party defendant in a suit brought by the State of Utah or the authority to sue anyone. Nor is it to be construed as such.

While Utah believes that the recommended conclusion by the Special Master is supported by the authority cited by him, Utah further endorses its earlier argument that the prior general consent statute was repealed by the enactment of the Governmental Immunity Act, even though the Special Master found it unnecessary to decide that question. This argument is fully supported by the discussion at pages 4 through 6 contained in Utah's brief dated January 24, 1968, and at pages 13 through 17 of its brief dated February 23, 1968. A careful reading of the two statutes shows that they are directly and completely inconsistent as to remedy, jurisdiction, procedure, limitations of actions and many other respects. It is believed that the conclusion is inescapable that the comprehensive Governmental Immunity Act

effectively repealed by implication the earlier consent statute, and particularly in view of the express language of Section 63-30-6 of the Utah Governmental Immunity Act which repealed all other acts or statutes in conflict with said Governmental Immunity Act.

POINT I. A. 2.

MORTON AND M & C CORPORATION ARE CITIZENS OF STATES OTHER THAN UTAH, AND CONGRESS HAS NOT IMPLEMENTED CONSTITUTIONAL JURISDICTION FOR SUCH CLAIMS IN AN ORIGINAL ACTION.

a. *SPECIAL MASTER'S RECOMMENDATION*: There is no specific recommendation.

b. *UTAH'S POSITION*: There is no constitutional jurisdiction in an original action for the claims asserted by the proposed intervenors.

c. *MORTON'S POSITION*: No position has been expressed.

d. *SUMMARY*:

Utah has argued that while there is constitutional judicial power in original actions for suits between a state and citizens of another state, that such judicial power had been implemented by Congress only to allow actions by a state against citizens of another state and not to allow actions by citizens of one state against another state.

The Special Master did not find it necessary to make any specific recommendation as to this point. His most relevant observation appears in the last paragraph on page 31 of his Report, as follows:

> Since the would-be intervenors are deemed citizens of a state other than Utah, the Court would have original jurisdiction over an action brought by the State of Utah against either or both of them. (Citing authority)

It will be noted that the above observations suggest only that there would be original jurisdiction in an original action for the State of Utah to sue private persons who are citizens of a state other than Utah, but there is no recommended conclusion as to whether citizens of a state other than Utah could sue Utah.

In Utah's brief dated February 23, 1968, pages 17 through 19, Utah explains the basis for this jurisdictional limitation, explaining that the act of June 25, 1948, 62 Stat. 927, 928, now codified as 28 U.S.C. Section 1251, purposely amended the judiciary act to prevent original actions by citizens of one state against another state. Neither of the would-be intervenors have questioned or challenged Utah's argument as contained in its brief of February 23, 1968.

POINT I. A. 3.

PRIVATE CLAIMANTS OCCUPYING THE SAME LEGAL POSITION AS MORTON AND M & C CORPORATION AND WHO ARE CITIZENS OF UTAH CANNOT INTERVENE.

BECAUSE THERE IS NO JURISDICTION FOR SUCH CLAIMS IN AN ORIGINAL ACTION.

a. *SPECIAL MASTER'S RECOMMENDATION*: There is no jurisdiction in an original action for claims between a state and citizens of the same state.

b. *UTAH'S POSITION*: Utah concurs in the recommendation of the Special Master.

c. *MORTON'S POSITION*: No exception has been taken by Morton to the recommendation of the Special Master.

d. *SUMMARY*:

This point might at first seem irrelevant in that neither Morton nor M & C Corporation is a citizen of Utah. But the relevance of the point lies in the fact that there are approximately 150 private persons owning land around the Great Salt Lake who assert claims identical to those which Morton seeks to assert through intervention in this action. It is thus obvious that if Morton is an indispensable party, then all other private persons similarly situated and with the same claims are equally indispensable. Since the great majority of the 150 private claimants are citizens of Utah, it is necessary to consider the jurisdictional impact of any determination which would require the inclusion of Morton and such other private claimants.

This point was raised and discussed by Utah at pages 11 through 16 of its brief dated January 24, 1968, and was further discussed at much greater length at

pages 19 through 71 of its brief dated February 23, 1968; and has been specifically adopted by the Special Master at page 31 of his Report, wherein the following conclusion is made:

> Thus the original jurisdiction of this Court is made dependent upon the character of the parties to a controversy, and the party or parties on one side must be a state or a number of states. But the party or parties on the other side of the case, citizen or citizens of another or opposing state, may not be joined to them as defendants, citizens of the same state which is bringing the action. *California v. Southern Pacific Co.*, 157 U.S. 229 (1895).

Since Utah has already devoted 59 pages of its printed briefs now on file with the Court to this very argument, and since the would-be intervenors have had an opportunity to present opposing arguments, and have not done so despite the specific adoption of such argument by the Special Master as referred to above, Utah elects simply to rely on the exhaustive coverage of this point as presented in its earlier briefs.

POINT I. B.

TO THE EXTENT THAT MORTON AND M & C CORPORATION SEEK TO CLAIM AGAINST THE UNITED STATES:

1. THE UNITED STATES HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY.

a. *SPECIAL MASTER'S RECOMMENDATION*: There is no specific recommendation by the Special Master, because he concluded there is no constitutional jurisdiction for Morton to intervene and claim against the United States, and thus found it unnecessary to decide whether the United States has consented to suit.

b. *UTAH'S POSITION*: The United States has not consented to suit by the proposed intervenors.

c. *MORTON'S POSITION*: The United States has consented to suit by the proposed intervenors.

d. *SUMMARY*:

This point also was raised by the State of Utah at pages 6 through 11 of its brief dated January 24, 1968, and was discussed at greater length and in more detail by Utah at pages 71 through 73 of its brief dated February 23, 1968.

The Special Master found it unnecessary to discuss or to make a recommendation as to whether the United States had consented to be sued by either Morton or the M & C Corporation. This was so because the Special Master concluded at pages 37 through 38 of his Report that there was no constitutional authority for Morton, M & C Corporation or any other private person or corporation to assert a claim against the United States is an original action. Without constitutional authority to sustain a claim against the United States in an original action, the Special Master concluded that such a claim could not be sustained even if Congress purportedly gave its consent.

Utah believes that the recommended conclusion of the Special Master is correct, since it is based on Point I.B.2, next succeeding in this brief.

But it is important to emphasize that it is absolutely clear that Congress not only failed to give its consent for the United States to be sued by Morton, M & C Corporation, or any other private person or corporation, but in fact made it manifestly clear that such private corporations and persons were not to be involved in the present original action and that whatever rights they might have would not be affected by this action. See the references to Utah's earlier briefs, and particularly the excerpts from Congressional hearings as quoted at pages 8 through 10 of Utah's brief dated January 24, 1968, and pages 71-73 of Utah's brief dated February 23, 1968.

POINT I. B. 2.

THERE IS NO JURISDICTION IN AN ORIGINAL ACTION FOR CONTROVERSIES BETWEEN THE UNITED STATES AND A CITIZEN OF A STATE.

a. *SPECIAL MASTER'S RECOMMENDATION*: There is no original jurisdiction of a controversy between a private citizen and the United States.

b. *UTAH'S POSITION*: Utah concurs in the recommendation of the Special Master.

c. *MORTON'S POSITION*: Morton has not filed any exception to this recommendation of the Special Master.

d. *SUMMARY*:

This point was first raised by the State of Utah at pages 73-74 of its brief dated February 23, 1968. The argument is simply that there is no constitutional grant of judicial power in an original action for actions between the United States and a citizen of a state. This point seems very clear and is not controverted by any judicial authority. The Special Master reached this conclusion at page 31 of his Report, wherein he observed:

> It is also clear that this Court does not have original jurisdiction over a controversy between a private corporation and the United States.

While the rationale of the above conclusion of the Special Master is not explained by him in detail, it is suggested that a thorough discussion of this conclusion may be found at pages 19 through 71 of Utah's brief dated February 23, 1968, as incorporated under Point II.B.2, pages 73-74, of said brief.

POINT II

NEITHER MORTON NOR M & C CORPORATION IS AN INDISPENSABLE PARTY TO THIS LITIGATION BECAUSE:

A. THERE WILL BE NO ADJUDICATION OF TITLE AS TO ANY LANDS IN WHICH EITHER MORTON OR M & C CORPORATION CLAIMS AN INTEREST.

a. ***SPECIAL MASTER'S RECOMMENDATION***: An adjudication between Utah and the United States will not affect the claims of private parties.

b. ***UTAH'S POSITION***: Utah concurs in the recommendation of the Special Master.

c. ***MORTON'S POSITION***: Morton has excepted to the recommendation of the Special Master.

d. ***SUMMARY***:

Utah initially raised the contention that the present litigation could and should proceed in the absence of Morton and the M & C Corporation because they were not indispensable parties. This was discussed in some detail at pages 16 through 47 of Utah's brief dated January 24, 1968. Utah further discussed the fact that there would be no adjudication of title effecting any lands in which any private party claimed an interest, and that the pragmatic test of indispensability strongly suggested that the Court should proceed in the absence of private persons to adjudicate the instant controversy between Utah and the United States, said discussion appearing at pages 3 through 12 of Utah's brief dated February 23, 1968. As Utah there pointed out at pp. 3-4:

> The present action is not one to quiet title. The United States owns no part of the subject lands. Any interest which the United States owned prior to June 15, 1967, was conveyed to the State of Utah by a quit claim deed issued that date, as required by the Great Salt Lake Lands Act. Thus, it is obvious that there will

be no adjudication at all directly affecting title. Since Utah now has whatever title the United States had, Utah will still have the same title after the litigation is concluded. Any decree which might be rendered in this action will have absolutely no affect on the status of the title, but will only determine whether Utah is required to pay the United States for land purportedly conveyed by the deed. That will be the impact, and the only impact, of this litigation.

The United States claims that it owned and quit-claimed to the State of Utah approximately 433,000 acres of reliction lands. Utah denies that these lands are reliction lands, and thus denies that the United States had any ownership interest to convey. So, while Utah acknowledges that it has received by conveyance whatever interest the United States had, Utah claims that it actually received nothing under the deed and should pay for nothing.

POINT II. B.

THE PRAGMATIC TEST OF INDISPENSABILITY DICTATES THAT THE COURT SHOULD PROCEED IN THE ABSENCE OF MORTON AND M & C CORPORATION:

a. *SPECIAL MASTER'S RECOMMENDATION*—The Court should proceed in equity and in

good conscience to settle the differences between Utah and the United States in the absence of the proposed intervenors.

b. *UTAH'S POSITION*: Utah concurs in the recommendation of the Special Master.

c. *MORTON'S POSITION*: Morton has excepted to the recommendation of the Special Master.

d. *SUMMARY*:

The Special Master has concluded that Morton and M & C Corporation are not indispensable parties. The following quotations from his report are illustrative.

At page 40:

> It is clear that the Court should proceed to decide the case in the absence of Morton et al. and not dismiss.

At pages 46-47:

> Without elaboration, the public and the courts have an interest in having the question of title over the relicted land decided. If it cannot be done as to all the persons in interest — at least a start in having it decided should be made. The matter is here. The Court should not lose the opportunity to get the ball rolling at least. Deciding the matter as between the State of Utah and the United States will be a big step in that direction.
>
> But even if Morton et al. had a more direct interest in the subject matter of this litigation, the interest of the State of Utah and, incident-

ally, the United States, the public and the courts in having this litigation completed far outweigh that of the private corporations to intervene herein.

From the foregoing, in my opinion, it is equitable and in good conscience to proceed to adjudicate the controversy between the State of Utah and the United States in the compelled absence of Morton and M & C Corporation. It is therefore submitted that this Court not dismiss the action on "indispensable" party grounds and permit the State of Utah and the United States to proceed to the merits of this action.

The conclusion of the Special Master, as thus reported to this Court, is fully supportable. It is within the sound discretion of this Court to determine whether Morton is indispensable. Such discretion is to be exercised after viewing all relevant considerations of a practical and equitable nature.

It is thus necessary to examine the particular facts of the case at bar, itemizing the major equitable factors which make the instant case strikingly unique and which present a compelling argument for continuing the litigation in the absence of Morton. The following summary is quoted from pages 41 through 47 of Utah's brief dated January 24, 1968:

1. The Nature of the Controversy is Highly Unusual.

The Great Salt Lake, in and of itself, is unique. While not the only "dead sea" in the world, it is the only inland salt sea where the slightest fluctuation in water level has such a profound impact on new land inundated or

new land exposed. The actual lands in dispute have no significant inherent value, but the brines in the lake have a very substantial mineral value. The mineral lessees of the State of Utah cannot effectively extract minerals from the lake without building expensive extraction facilities on the lands adjacent to the lake. It is, therefore, necessary to obtain title security to the exposed lands around the lake and the brines in the lake in order to develop and extract the minerals from the lake brines.

2. There is no other Forum Available to Determine the Present Controversy Between Utah and the United States.

If Morton and the other private claimants similarly situated are determined to be indispensable parties and the case thus had to be dismissed for lack of constitutional jurisdiction, then it necessarily follows that there is and can be no other forum for litigation of the respective claims to the lands in question. This is so because the claims of the United States would not be determined or resolved, and the United States would appear to be just as indispensable to any action in the state courts of Utah as Morton would be in this action. Congress would be without power to enact new legislation to provide consent for the United States to be sued in the federal district court of Utah, for there would be no constitutional jurisdiction for a quiet title action between a state and its own citizens in

the federal district courts. If the present action were to be dismissed, there would thus be no state or federal court which would or could have jurisdiction over all of the indispensable parties. Neither the Utah Legislature nor the United States Congress could by legislation provide a forum. The present vexation and crippling uncertainties would persist —perhaps forever!

3. The Need to Settle the Present Controversy Between Utah and the United States has been Demonstrated by the Legislative and Executive Branches of both Governments.

The crying need for an adjudication to settle the differences between Utah and the United States has been vividly demonstrated by the affirmative involvement of the legislative and executive branches of both Utah and the United States governments. With respect to the legislative branch of the United States Government, Congress has specifically enacted the Great Salt Lake Lands Act to provide for the current litigation; and with respect to the legislative branch of the Utah Government, the Utah Legislature has specifically consented to the provisions of the federal act and has specifically authorized the present litigation.

The executive branch of the United States Government became directly involved when

the Department of Interior reported to Congress an immediate need for the legislation to allow resolution of the title problems (Senate Hearings, *op cit, supra,* page 11), and when President Lyndon B. Johnson, prior to signing the Great Salt Lake Lands Act into law, initiated a discussion with Governor Calvin L. Rampton with respect to the provisions and impact of the bill. Similarly, the executive branch of the Utah State Government became deeply involved when, at the Congressional hearings with respect to the Great Salt Lake Lands Act, Governor Calvin L. Rampton testified to the urgent economic needs of the State which were being seriously hurt by the delay in resolving title uncertainties (Senate Hearings, *op cit, supra,* pp. 14-15), when the Utah Land Board testified to the injurious effect on mineral leasing (Senate Hearings, *op cit, supra,* pp. 45-50), when the Utah Fish and Game Department testified to the injurious impact on valuable waterfowl resources which serve waterfowl feeding and resting needs for large numbers of birds that migrate as far as from Russia to South America (Senate Hearings, *op cit, supra,* pp. 50-60), and when the Great Salt Lake Authority testified to the injurious impact on its attempt to develop swimming, boating and other recreational facilities along the lake (Senate Hearings, *op cit, supra,* pp. 60-69). Certainly there could be few, if any, parallel examples which

would match the instant case as to the injurious mineral, industrial, waterfowl, recreational and related impacts sustained by a state as a result of lack of a forum to litigate. Or, for that matter, it would be difficult to find many examples where both the state and national governments, through both legislative and executive involvement, exerted such strenuous efforts to provide a means for litigation to resolve the controversy.

4. Inclusion of Morton and the other Private Persons Would Create a Complexity Incapable of Adjudication.

The present litigation, if only Utah and the United States are involved, will be reasonably simple and will be capable of an expeditious determination. But to include the private claimants as parties would cause the case to assume such a cumbersome complexity as to make any effective adjudication totally impossible. This is so because many of the private claimants have peculiar legal positions in relation to the claims and defenses which would be asserted against them by the State of Utah but which would not be asserted by the State of Utah against the United States. These claims and defenses would include statute of limitations, laches, estoppel, boundary-line agreements, boundaries by acquiescence, res adjudicata, purchase, and others. In most instances, substantial discovery would

have to be done, including the taking of numerous depositions, where no one except Utah and a particular private claimant would be involved.

This is to say that in many instances the claims and defenses between the State of Utah and a single private claimant would assume the proportions of an entire lawsuit, including little in common with any of the other private claimants or with the United States. It is admitted that the position of Morton is less complex than would be the position of many other private claimants, and the issues between Morton and the State of Utah would be simpler than in many other instances between Utah and other private claimants.

But, even with Morton, the trial would not be a simple matter. To illustrate the genuineness of the present claim of complexity, the answer and counterclaim filed by Utah against Morton in Civil No. C-127-66, United States District Court for the District of Utah, is useful. In that pleading there are thirteen defenses and a counterclaim in two counts. Beyond the issues now in this action between Utah and the United States, it would appear that if Utah were required to litigate with Morton and if the same issues were here raised as were raised in the federal district court, this Court would be required to determine estoppel, estoppel from denying title of landlord, latches, four separate defenses relat-

ing to statutes of limitation, and construction of a lease agreement between Utah and Morton. If the litigation progressed it would certainly get more involved than that, and, as said above, Morton's position is relatively simple compared with many of the approximately 150 private claimants.

Further, if the private claimants were to be included, and if this Court were to limit the adjudication to a "quiet title" action of the land claimed by the United States—and that only—it would be but a piece-meal litigation. There would be no resolution of conflicting claims *between private owners* as to lands claimed by the United States, nor would there be any resolution of ownership in those areas where the United States does not claim title. In other words, to include the private claimants would be to add a fantastic complexity to the present litigation without accomplishing anything near "complete and final" justice, even for the parties before the Court.

The foregoing discussion, with respect to the complexity and involvement of the litigation if the private claimants were to be included as indispensable parties, is moot in the sense that this Court would not have jurisdiction to proceed to any adjudication if private claimants were to be made parties to this action. But this illustration of complexity, as well as the earlier discussion relating to the great

harm to be suffered by everyone unless some relief is afforded in this action, is simply to show particular facts which should be carefully weighed by a court of equity in determining whether the private parties should be termed indispensable.

5. Any Rights or Interests of Morton, M & C Corporation, and any other Private Claimants Can be Protected in Their Absence.

It is true that if any of Morton's property rights were to be impaired or destroyed by this action, in the absence of Morton, then it obviously would be unconstitutional to proceed to that result. But that is not the case here. Utah in its complaint has prayed only that the Court determine the respective interests between it and the United States. Congress has specifically said that private rights and interests shall not be affected by this action. Surely, any decree or judgment entered by this Court can and must be shaped and drafted so as to incorporate the protective legislative language and to provide specifically that any and all claims of private parties shall be preserved and shall be unaffected by the decree, and that the adjudicated rights of the State of Utah and the United States shall in no way be construed to impair or diminish the claims of private owners.

If the complaint asks nothing of Morton, if Congress says Morton's rights shall not be

affected, and if the United States Supreme Court says that Morton's rights are not to be affected—then it is difficult to see how or by whom Morton's rights will be affected.

CONCLUSION

The present litigation should proceed in the absence of Morton and M & C Corporation. Any claims or interests of Morton or M & C Corporation can be fully protected in their absence, and there will be no adjudication in this action which will have any affect or impact on their claims or rights. The only conceivable interest of Morton and M & C Corporation is that there may be common questions of law and fact, but to the extent that any such question or questions exist, both Morton and M & C Corporation will be adequately represented by either the State of Utah or the United States of America, depending on the particular interest that such would-be intervenors would have with respect to any such common question of law or fact. And, in any event, any adjudication in this action will not be binding on any absent persons and will not be *res adjudicata* as to them.

Utah's resistance and opposition to intervention by Morton and M & C Corporation is not based on a desire to keep those persons out of the present litigation simply for the purpose of preventing them from participating as parties in this action. The basic and fundamental reasons are both practical and legal. The practical objection of Utah is that to include the would-be

intervenors as parties would necessarily require the inclusion of approximately 150 other private persons who are similarly situated, and would thus make the present litigation so complex, involved and cumbersome as to make any meaningful adjudication impractical, if not impossible. The legal objection is that a determination that Morton and M & C Corporation are indispensable parties would divest the court of jurisdiction to proceed to any adjudication, for the five separate and independent jurisdictional obstacles set forth above.

Utah desires to obtain an expeditious and meaningful determination of the lands, if any, for which it must make payment to the United States. Utah wishes to proceed in accordance with the plain intent of the United States Congress and the Utah Legislature, and to avoid making the litigation complex or burdensome, and to avoid anything that would destroy the jurisdiction of the Court and thus prevent the needed adjudication. Utah fully supports the Report of the Special Master, since it is entirely in accord with the positions heretofore expressed by Utah. Utah does not object to the recommendation of the Special Master that ownership of the brines and minerals should be placed in issue to avoid any subsequent claim by the United States to compensation for such brines and minerals, since Utah desires certainty of title as to the brines as well as the lands, and believes that the United States had simply hesitated to put ownership of the brines in issue because it had not found any meritorious theory supported by facts pursuant to which it could claim ownership of such brines.

In any event, Utah respectfully urges the Court to accept and adopt the report of the Special Master as filed, and thus permit Utah and the United States to proceed to an early adjudication to determine what ownership interests, if any, were owned by the United States and conveyed to Utah, and for which Utah must make payment.

Respectfully submitted,

VERNON B. ROMNEY
Utah Attorney General

ROBERT B. HANSEN
Deputy Utah Attorney General

DALLIN W. JENSEN
Assistant Utah Attorney General

RICHARD L. DEWSNUP
Special Counsel for Utah

Counsel for Plaintiff

236 State Capitol Building
Salt Lake City, Utah 84114

January 10, 1969

CERTIFICATE OF SERVICE

I, Robert B. Hansen, Deputy Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing brief of the State of Utah were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D.C., 20530; Frank A. Wollaeger, 110 North Wacker Drive, Chicago, Illinois 60606, and Martin Jacobs, 17 Pennsylvania Avenue, N.W., Washington, D.C. 20006, attorneys for Morton International, Inc.; and Raymond Senior, 10 Exchange Place, Salt Lake City, Utah 84111, and Robert D. Larsen, 1730 K Street, N.W., Washington, D.C., 20006, attorneys for Great Salt Lake Minerals and Chemicals Corporation; by mailing the same, air mail postage prepaid, to their respective offices, this 10th day of January, 1969, all in accordance with the Rules of this Court.

ROBERT B. HANSEN
Deputy Attorney General
State of Utah